STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

David Hoffman
Hoffman Construction Co
123 County Road A
Black River Falls WI 54615-9209

PECFA Claim #54615-9208-05
Hearing #96-164

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed March 6, 1996, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce (Department), a hearing was commenced on October 28, 1997, at Madison, Wisconsin. A Proposed Decision was issued on October 2, 1998 (copy attached), and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

> Whether the Department's decision dated February 12, 1996 establishing the final reimbursable costs to the Appellant from the Petroleum Environmental Cleanup Fund Act (PECFA) program was correct and reasonable.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

David Hoffman
Hoffman Construction Co
123 County Road A
Black River Falls WI 54615-9209

By: In Person

Department of Commerce

PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Kristiane Randal
Department of Commerce
201 W. Washington Ave., Rm. 623
PO Box 7838
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned, Terry W. Grosenheider, Executive Assistant, by order of the Secretary dated March 3 1, 1999 of which a copy is attached to this Final Decision.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated October 2, 1998 are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated October 2, 1998 are hereby adopted for purposes of this Final Decision.

DISCUSSION

The Discussion in the Proposed Decision dated October 2, 1998 is hereby adopted for purposes of this Final Decision.

FINAL DECISION

The Proposed Decision dated October 2, 1998, is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new heating, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6' Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law. or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6' Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described-in Sec. 227.53 of the statutes.

Dated: April 6, 1999

Terry W. Grosenheidr
Executive Assistant
Department of Commerce
PO Box 7970
Madison WI 53707-7970

cc: David Hoffman
Kristiane Randal, Assistant Legal Counsel, Wisconsin Department of Commerce
Dispute Resolution Coordinator, PECFA

Date Mailed: 4/16/99

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

IN THE MATTER OF: The claim for Reimbursement under the PECFA Program by

MADISON HEARING OFFICE
1801 Aberg Ave., suite **A**
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608)242-4813

David Hoffman
Hoffman Construction Co.
123 County Road A
Black River Falls, WI 54615-9209

Hearing Number: 96-164
Re: PECFA Claim # 54615-9208-85

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision to the department in this matter.

STATE HEARING OFFICER:
James R. Sturm

DATED AND MAILED-.
October 2, 1998

* *

MAILED TO:

Appellant Agent or Attorney

Jan Smit
Ayres Associates
P.O. Box 1590
Eau Claire, WI 54702-lS90

Department of Industry, Labor and Human Relations

Michael-Mathis
201 E. Washington Ave. 331X
P.O. Box 8942
Madison, WI 537087-8942

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT

IN THE MATTER OF:

Request for Reimbursement Pursuant
to the Provisions of the PECFA Program

Hearing Number: 96-164
PECFA Claim Number: 54615-9208-85

David Hoffman
Hoffman Construction Co.

Appellant

Wisconsin Department of Commerce,

Respondent.

Vs

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW

On February 12, 1996, the Department of Commerce (department) issued a decision denying David Hoffman and Hoffman Construction Co. (appellant) reimbursement of $39,147.45, a portion of its total claim of $109,136.36. $6798.56 of that amount was held to be an overpayment of an amount already paid. The appellant filed an appeal and, pursuant to that appeal, a hearing was held on October 28, and November 24, 1997, before Law Judge James R. Sturm, acting as a state hearing officer.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

PROPOSED FINDINGS OF FACT

1. At all times material, David Hoffman, d/b/a Hoffman Construction Co., was the legal owner of the premises located at 5 County Highway A, Black River Falls, Wisconsin.

2. The subject property contained seven petroleum underground stage tanks (USTs), that were on the property prior to its purchase by the appellant.

3 The appellant contracted with Exploration Technology Inc. (ETI), to conduct the tests and make assessments and remedial efforts necessary for any petroleum contamination of soil or groundwater.

4. After three soil borings and four monitoring wells were installed in June and July of 1990, ETI prepared a site assessment detecting petroleum contamination which was submitted to the Wisconsin Department of Natural Resources (DNR) in October, 1990. The seven USTs and 350 cubic yards of contaminated soil were removed between May and September of 1991.

5. ETI reported, as a result of separate lab analyses and field screenings in May, June and August, 1991, the existence of petroleum contamination in the soil and groundwater with a decrease in the level of contamination having occurred between June, 1990 and April, 1991.

6. ETI recommended two systems to reduce or remove the contamination; a soil vapor extraction (SVE) system for the soil contamination combined with a "pump and treat system" (P&T) to reduce groundwater contamination levels. Piping for both systems and a recovery trench were installed in October 1991.

7. ETI submitted the proposal for the use of the joint systems to a DNR official who concluded that "the proposed groundwater Pump and Treat (P&T) and Soil Vapor Extraction (SVE) systems will address the contamination in an appropriate manner". On June 23, 1992, the DNR notified the appellant that its proposal appeared to"address the contaminations in an appropriate manner...Approval is granted to begin the design of the P&T and SVE.systems. All pump/pilot tests and computer modeling results as well as all final engineering designs shall be submitted for my approval before installation of either system." (emphasis in original).

8 In May 93, ETI prepared a report for the DNR describing its corrective action design report. That report emphasized a two part plan consisting of the groundwater treatment system and previously installed SVE system. The coordination of the two systems involved the manipulation of the groundwater levels within a range of three feet with an essential purpose of continually washing the hydrocarbon contaminant into the soil to allow vapor extraction during the periodic drawdown.

9. ETI went bankrupt in the first quarter of 1994 and no further work was done by ETI after April 12, when the SVE system was hooked to a pump and put into operation. The P&T system remained unrealized.

10. The appellant hired Ayres Associates to replace ETI. Ayres reviewed the history and installation and conducted its first test in December, 1994. Its conclusion in that December 5, 1994 test was that the SVE was "emitting low to non-detectable levels of petroleum compounds."

11. Ayers submitted its first report in January, 1995 and concluded that that the SVE system was short circuiting through the recovery trench sump, decreasing its efficiency, reducing the radius of influence of its trench to an estimated 45 feet. It also included that ETI's estimate of a flow rate of 50 gallons per minute in its proposed trench and sump ground water treatment was overestimated as was ETI's calculation of the aquifer thickness by about ten feet.

12. The appellant was notified by a DNR project manager that its system was ineffective as constructed and operated and was installed without DNR oversight and approval.

13. In early 1995, additional soil and groundwater testing indicated that there was significant improvement in contamination levels and that passive remediation was being considered as the most effective treatment of the contamination on the appellant's property.

RELEVANT STATUTES AND RULES

Section 101.143(3) Stats. provides, in relevant parts as follows:

(3) CLAIMS FOR PETROLEUM PRODUCT INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES.

(c) Investigations, remedial action plans and remedial action activities. Before submitting an application under par. (f), except at provided under par. (g), an owner or operator or the person shall do all of the following:

1. Complete an investigation to determine the extent of environmental damage caused by a discharge from a petroleum product storage system or home oil tank system.

2. Prepare a remedial action plant that identifies specific remedial action activities proposed to be conducted under subd. 3.

3. Conduct all remedial action activities at the site of the discharge from petroleum product storage system or home oil tank system necessary to restore the environment to the extent practicable and minimized the harmful effects from the discharge as required under s.292.11.

4. Receive written approval from the department of natural resources or, if the discharge is covered under s. 101.144(2)(b), from the department of commerce that the remedial action activities performed under subd. 3 meet the requirements of s.292.11.

(f) Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans, and expenditures associated with the eligible costs incurred because of a petroleum products discharge from petroleum product storage system:

1. A record of investigation results and data interpretation.
2. A remedial action plan.
3. Contracts for eligible costs incurred because of the discharge and records of the contract negotiations.
4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.

5. The written approval of the department of natural resources or the department of commerce under par. ©4.
6. Other records and statements; that the department; determines to be necessary to complete the application.

Section 101. 143(4) Stats., provides, in relevant parts as follows:

(b) Eligible costs. Eligible costs for an award under par. (a) include actual costs or, if the department establishes a schedule under par. (cm), usual and customary costs for the following items only:

6. Soil treatment and disposal.

12. Contractor costs for remedial action activities.

14. Other costs identified by the department as necessary for proper investigation, remedial action planning and remedial action activities to meet the requirements of s. 292.11.

(c) Exclusions from eligible costs. Eligible costs for an award under par. (a) do not include the following:

3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum products discharge from a petroleum product storage system or home oil tank system.

4. Costs, other than costs for compensating 3rd parties for bodily injury and property damage, which the department determines to be unreasonable or unnecessary to carry out the remedial action activities as specified in the remedial action plan.

Section ILHR 47.30(l)(c) and (d) of the Wisconsin Administrative Code provides as follows:

(1) ELIGIBLE COSTS. Eligible costs for an award issued under this chapter may be determined by the department based upon cost guidelines published by the department. Costs related to the following categories may be reimbursed under the scope of this chapter:

(c) Costs associate with excavation and disposal of contaminated soils:

1. Removal of contaminated soils;
2. Actual costs incurred. which are associated with equipment mobilization;
3. Removal of petroleum products from surface waters, groundwater or soil; and
4. Treatment and disposal of contaminated soils including DNR approved procedures for bio-remediation.

(d) Costs associated with monitoring and other remedial action activities:

1. Monitoring of natural bio-remediation progress;
2. Actual charges for maintenance of equipment used for petroleum product recovery or remedial action activities;...
3. Other costs identified by the department as necessary for proper investigation, remedial action planning and remedial action activities to meet the requirements of s. 144.76, stats.

Section ILHR 47.40(3)(c) (1) of the Wisconsin Administrative Code provides as follows:

(c) Insurance. 1. All consulting firms shall obtain and maintain errors and omission (professional liability) coverage....

2. A certificate or certificates verifying the existence of the required insurance coverage for all environmental consultants, who perform work included in a claim, shall be submitted with the PECFA claim.

THE APPELLANT'S POSITION

The Hoffman Construction Company contends that it is eligible for reimbursement under the PECFA program for the remediation and installation costs in the amount of $39,147.45 that took place before April 12, 1994, pursuant to the provisions of sec. 101.143(3)(g), Stats. and were denied by the department. The appellant argues that it proceeded in good faith to clean up the environment in conducting remedial activities on soil and groundwater on property that was already contaminated when purchased by the appellant. The appellant argues that it followed the statutory requirements by hiring experts to analyze, design and construct a system. The appellant asserts that the soil vapor extraction (SVE) and pump and treat (P&T) system, was the least costly alternative (compared to excavation and removal of the contaminated soil) and was approved by the DNR, regardless of its eventual adequacy or efficiency.

The appellant points out that the site is not yet closed, that it is essentially a work in progress and that its system will yet prove its worth. The appellant also points out that its contractor went bankrupt and required it to retain another contractor to continue the project.

THE RESPONDENT'S POSITION

The department/respondent contends that it rightfully denied certain costs submitted by Hoffman Construction because the system employed by its consultant, ETI, was ineffective. It argues that the SVE and P&T system was poorly designed, partially installed, briefly operated and inconsequential in its effect on the contaminant levels. The department, in its brief, describes with considerable thoroughness, the severe limitations of the single trench and pipe interred horizontally without lateral extensions into the entirety of the contaminated area. The appropriate cost comparison, argues the respondent, is between the cost of the soil excavation alternative for only that same area of soil covered by the single pipe.

The respondent argues that the appellant has the burden of proof in demonstrating that its system was of good design, properly installed and operated and, particularly, effective. While it considers the cost effectiveness between the excavation alternative and the system employed, it stresses that the basic, functional design and implementation of the partial system cannot be justifiably compensated despite the good faith of the owners of the contaminated property. It surmises that the appropriate source of compensation for the appellant for the expenses incurred on an incomplete and inadequate system would be through a claim to its consultant's insurer as required under Administrative Rule ILHR 47.30(3)(c)1.

DISCUSSION

The appellant contended that it is eligible for reimbursement under the PECFA program for the remediation and installation costs in the amount of $39,147.45 that took place before April 12, 1994, pursuant to the provisions of sec. 101.143(3)(g) Stats. The respondent defends the department's decision to deny the appellant's claim for that amount because of the work performed during that period of time. The appellant contends that its good faith decision to contract with ETI as its consultant plus the implementation of a system that is, at least, the basis for further additions and modifications, is in compliance with the PECFA program's new rules and law and should be compensated notwithstanding the department's dissatisfaction with the degree of successful decontamination. The department answers by arguing that the system was ill-conceived, poorly executed, partially implemented, and essentially, unnecessary.

The contamination at the site has abated since the time of the initial testing in 1990, and appears to have abated without regard to what the appellant did or did not do since that date. It appears that nature is taking its course. Regardless of the actions of the laws of nature, it is the law of the land, of the State of Wisconsin, that must be examined and applied here, and it is the decision here that the department acted appropriately in denying the claims that it did.

First of all, the statutes and rules give the department considerable discretion to pass its judgment on the appellant's claims within the guidelines and categories established therein. The department declared that the system was incomplete with regard to its own design and ineffective in its application as well as in its potential. The appellant points out that the system was approved by DNR personnel in June, 1992, however the system had already been installed in October, 1991. Furthermore, DNR approved its "proposal" and instructed that its final engineering designs must be approved "before installation"…The appellant thereby assumed a considerable risk that the costs of its work, when submitted for approval, would rise or fall on an examination of the process and effectiveness of the incomplete system at that time, any good faith in environmental clean-up, notwithstanding.

The appellants were also considerably damaged by the bankruptcy of the consultant (ETI) who incurred the disallowed costs. That consultant was unavailable for completion, modification or explanation of its analyses and its work. Respondent's suggestion that ETI's own interest may have been its motivation in making the recommendations it did rather than sound environmental engineering analysis is well taken. Consequently, as respondent suggests, the appellant's cause of action or claim for liability should have been with the consultant's

insurer (if not its own) rather than expecting the department to give it relief for the inadequacy of the performance of its consultant in attempting to comply with its contaminated property.

PROPOSED CONCLUSIONS OF LAW

1. David Hoffman d/b/a Hoffman Construction Company is a property owner within the meaning of section 101.143 of the Wisconsin Statutes.

2. The removal of the Underground Storage Tanks 5 County Highway A, Black River Falls, Wisconsin, was remedial action activity entitling Hoffman to be reimbursed for costs approved for reimbursement under section 101.143(3) of the Wisconsin Statutes.

3. The Department's action denying reimbursement in the amount of $39,147.45 for costs incurred prior to April 12, 1994 was reasonable under sections 101.143(3)(d) and 144.76 of the Wisconsin Statutes and ILHR 47.30.

PROPOSED DECISION

The State Hearing Officer therefore finds that the decision of the Department of Commerce dated February 12, 1996 establishing the final reimbursable costs to the applicant, Hoffman Construction Company, was reasonable and is affirmed.

Dated this 1st day of October, 1998

By: James R. Sturm
Administrative Law Judge
Madison Hearing Office
1801 Aberg Ave, Suite A
Madison, WI 53797-7985